IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

MISCELLANEOUS PETITION NO.48 OF 2006

IN

TESTAMENTARY PETITION NO.940 OF 1978

Merlyn Catherine Fialho. ...Petitioner.

vs.

Malcolm Philip Francis John D'Lima. ...Respondent

Mr.Satish Shah with Ms.N.Dutia i/b. Nameet & Co., for Petitioner.

Mr.Snehal Shah i/b.M/s.Dhru & Co., for Respondent.

CORAM: D.K.DESHMUKH,J.

DATED: 14th December,2006..

P.C.:-

1. By this petition, the petitioner seeks an order for revocation of the probate granted on 28.10.1982 in testamentary petition no.940 of 1978. That petition was filed by the respondent for obtaining probate of the Will of the testator who died on 15.10.1977. The petition for probate was filed in the year 1978 and the probate was

granted on 28.10.1982. The petitioner is the daughter of the testator and the respondent is the son of the testator. Alongwith the probate petition filed by the respondent, an affidavit of the petitioner dated 12.3.1982 was filed giving her consent for issuing of probate in favour of the respondent. According to the Will, the respondent was the executor of the Will. By the Will the entire property was given to the respondent and only life interest was created in favour of the mother of the petitioner and the respondent. The mother died in October,1992. In the Will of which the probate

has been granted, it is stated that the testator has a daughter viz. the petitioner who has been given Rs.15,000/- as dowry at the time of her marriage in January,1970 and therefore, the testator is not giving any share in the property left behind by him to his daughter. According to the petitioner, she has never signed the affidavit which was filed by the respondent in the probate petition no.940 of 1978. According to the petitioner, she came to know that her father left behind a Will and that the probate of that Will has been granted in favour of the respondent when in February,2006 she was informed by some friends that some land situated at Malvani at Malad which was belonging to her father has been recently sold by the respondent. Thereafter, she made inquiry and then she came to know about filing of probate petition. The petitioner states that in the affidavit filed in the probate petition she has been identified by a lawyer viz. Ms.Maya Sadhwani. According

to the petitioner, she wrote a letter to the lawyer Ms.Maya Sadhwani inquiring from her as to why she has stated in the affidavit that she has identified the petitioner when she does not know the petitioner. According to the petitioner, that letter has been received by Ms.Maya Sadhwani but she has not sent any reply. The petitioner states that till the year 2006 she did not make any inquiry about the estate left behind by her father because she was brought up as an obedient Roman Catholic daughter. According to the petitioner, after the death of her father she used to come to Bombay at intervals of six months and stay a few days at a time. She all the while remained out of Bombay till her husband retired in the year 2002. Thereafter, she alongwith her husband settled down in Bomhay. The respondent, in reply, denies that the petitioner did not sign the affidavit which was filed in the probate petition. According to the respondent, the petitioner was always aware of the Will and the probate petition. The respondent relies on

the letter signed by the petitioner, the respondent and their mother of the year 1982 to the Trustees of Seth Mulraj Khatau Trust Settlement, wherein the Will and the probate has been disclosed. The petitioner denies her signature on that letter also. The learned Counsel appearing for petitioner submits that the signature of the petitioner on the affidavit filed in the probate petition has been forged, the lawyer has falsely identified her even when the lawyer did not know her and

that she had never approached the lawyer. He submits that till the petitioner learnt in the year 2006 about sale of some of the properties, she has no reason to make inquiry about the estate left behind by her father. The learned Counsel further submits that as the probate has been obtained by the respondent by relying on the forged document, it is liable to be revoked. He also submits that the probate is liable to be revoked also because the respondent has willfully omitted to execute inventory and account in accordance with the provisions of Chapter 7 of Part 9 of the Indian Succession Act. He submits that the respondent has admitted that he has not published inventory as required by Law and he has merely stated that he will comply with the requirement of law. The learned Counsel submits that the petition has been filed within the limitation because the petitioner, for the first time came to know of the probate in the year 2006 and immediately the petition has been filed.

2. On behalf of the respondent on the other hand it is submitted that the petition is barred by the law of limitation. The probate was granted in the year 1982. The petitioner was aware of the grant of probate all along. It is submitted that the affidavit which was filed in the probate petition was signed before the District Court at Pune. The petitioner has been identified by a lawyer. The petitioner also disputes her signature on the letter which is signed by the

respondent and their mother also. The petitioner has not examined any expert witness to prove that the signature on the affidavit filed in the probate petition is not that of the petitioner. It is further submitted that if according to the petitioner, the lawyer Ms.Maya Sadhwani has falsely made the endorsement about identifying the petitioner then either that lawyer was to be joined as a party-respondent to this petition or she should have examined that lawyer as witness. Without following this procedure recording of finding which is requested by the petitioner that she was wrongly identified by the lawyer cannot be recorded by this court because it would be in breach of the principles of natural justice. It is further submitted that the petitioner, according to her affidavit, used to visit Bombay every six months and was staying with the respondent. So also, her daughter stayed for seven years with the respondent. It is impossible to believe that the petitioner who was interested in the property left behind by the father would not have made any inquiry during this extraordinary long period. It is submitted that though there is requirement of filing inventory as the respondent was the only beneficiary and he was executor also and only other beneficiary who was the mother was living with him, the petitioner did not file any inventory though he proposed to do so. Non filing of inventory by the petitioner cannot be termed as breach. The cause that is shown by the petitioner for not filing the inventory is a reasonable cause and therefore, for that reason the probate cannot be

revoked.

3. In the Will of which the probate has been granted, the petitioner is referred to in paragraph (5) and it is stated thus:-

> "I do hereby declare that I have reserved Rs.15,000/- (Rupees Fifteen thousand only) to be given as a dowry to my daughter MERLIN D'LIMA alias MERLIN CATHERINE D'LIMA on her marriage in January 1970 or thereafter and on the receipt of this amount by my said daughter, she shall not be entitled to any share in any of my properties moveable or immoveable."

In paragraph 3(b) of the petition, the petitioner states that her father was operated upon for removal of a brain tumor in the year 1965 . At that time she was residing with the deceased alongwith her mother and her brother i.e. respondent. In paragraph 3(c) the petitioner states thus:-

> "3(c). Inspite of the serious nature of the operation, the said deceased did not take the Petitioner into confidence, or entrust any of his responsibilities to her, but apparently chose to rely upon the Respondent hereto, who was still studying in school and was about 19 years old at that time. The Petitioner noticed that the Respondent would withdraw money and perform other similar tasks which the Respondent had been performing himself

> until the operation. The Petitioner who is older than the Respondent and was working at the time, felt offended at the lack of trust in her, but said nothing in view of the custom of the deceased's family that the female members should not be involved in matters relating to the family property."

Thus, according to the petitioner also during his life time her father the testator trusted his son the respondent in relation to the property and not the petitioner. The petitioner got married on 17.1.1970 . Her father expired on 15.10.1977. It is clear that the petitioner was fully aware of the property left behind by the father. It is common ground that one of the properties which has been bequeathed by the Will in favour of the respondent is residential house which was owned by the father. Therefore, obviously, the petitioner was aware that the father has died leaving behind him the property. The conduct of the of filing this petition shows that she was interested in claiming her share in the property left behind by the father. In this situation any normal human being would have, if she had not signed the affidavit filed in the probate petition, enquired from the mother who was alive till October,1992 or from the respondent as to what has happened to her share in the father's property. The petitioner has not given any explanation for not making any inquiry in that regard except saying that she was brought up as an obedient Roman Catholic daughter and

therefore, did not question the respondent and her mother about the details of the estate of the deceased or whether the petitioner was entitled to any share in the estate left behind by the father. If the petitioner was interested in the estate left behind by the father, had she not signed the affidavit filed with the probate petition, she would have definitely made inquiry either from the mother or from the brother. The main basis of the petition by the petitioner is that her signature on the affidavit filed in the probate petition is forged. Perusal of the affidavit filed in the probate petition shows that the affidavit was affirmed before the Nazir of the District & Sessions Court, Pune. The petitioner was identified by a lawyer. Therefore, as the affidavit appears to have been affirmed in regular course of business, the Court will be entitled to presume, until contrary is proved, that the affidavit was sworn in regular course of business and that it was signed by the petitioner. Therefore, the burden was heavily on the petitioner to show that her signature on that affidavit is forged. In my opinion, in order to discharge that burden it was for the petitioner to examine expert witness to depose about the nature of the signature. The petitioner has not led any oral evidence of any expert witness to prove that her signature on the affidavit is forged. In my opinion, leading of such evidence was necessary because the authenticity and genuineness of the affidavit of the year 1982 was being challenged after more than 20 years. The result of believing in the case of the petitioner would be to

upset not only the grant of probate but also any transaction that might have taken place on the basis of the grant of probate in favour of the respondent. Thus to say the least believing in the case of the petitioner that her signature on the affidavit is forged has drastic consequences, and therefore, in my opinion, unless impeachable evidence is produced by the petitioner that her signature on the affidavit is forged, the Court will not believe the case of the petitioner. In order to believe the case of the petitioner, the Court will also have to record the finding that the lawyer Ms.Sadhavani has falsely identified the petitioner. If the petitioner is inviting such a finding, which would have adverse consequence for any practising lawyer, either the petitioner should have joined that lawyer as a party to this petition so that that lawyer would have got an opportunity to explain her conduct or at least that lawyer could have been summoned as witness in this Court. The petitioner has done neither. When the learned Counsel appearing for petitioner was in the midst of arguing the matter, this was pointed out to the learned Counsel. At that stage he sought permission to lead oral evidence. In my opinion, it was for the petitioner to decide whether he wants the Court to decide his case only on the basis of the affidavit or he wants to lead oral evidence when at the request of the petitioner the Court fixed the matter for hearing. It is obvious that the petitioner took the decision that she wants to argue the matter and wants the Court to decide it on the basis of the affidavits. In my opinion, at such a late

stage when the Court has spent considerable time on hearing, the petitioner could not have been permitted to lead oral evidence. One more reason why, in my opinion, the grant of an opportunity to the petitioner at such a late stage would not be in the interest of justice is improbability of the case put up by the petitioner. That though she was interest in claiming her share in the property left behind by her father, though admittedly she was visiting Bombay every six months, though her daughter was residing with the respondent, she did not find it necessary to make any inquiry about her share in the property left behind by the father either during the life time of her mother or after her mother died in the year 1992. The petitioner has relied on the proceedings in the Civil suit in which both the petitioner and the respondent were defendants to claim that the respondent was deliberately keeping her in dark. In my opinion, such inference on the basis of the proceedings in that suit cannot be drawn because the respondent was also a defendant in that suit as was the petitioner.

4. What is further pertinent to note is that the respondent has produced document on record of the year 1993 which shows that the petitioner has received benefits from the estate of one uncle Thus, it cannot be said that the petitioner was totally unaware that if the father has died intestate each heir would get benefit out of the estate left behind. At least at that stage the petitioner could have made

inquiry. In my opinion, it would be hazardous to re-open the transaction of the year 1982 merely on a bald statement made by the petitioner that her signature on the affidavit is forged and that she did not make any inquiry for all these years. In my opinion, the version of the petitioner is unbelievable.

5. So far as the submission that the probate should be revoked for not filing of any inventory by the petitioner is concerned, perusal of the provisions of Section 263 of the Indian Succession Act shows that the probate can be revoked for non filing of the inventory, if the inventory is not filed without reasonable cause. It is clear from the Will that the apart from being executor of the Will the respondent was a beneficiary alongwith his mother. The mother was given only life interest in the estate.. The mother was living with the respondent during her life time . She has not made any grievance therefore, in my opinion, it is believable that the respondent in this situation thought that he is not required to file any inventory. Non filing of inventory by the respondent has not caused any loss to the petitioner. If the petitioner is to be believed that her signature on the affidavit was forged, therefore, she was totally unaware of the probate petition, then even if the inventory would have been filed in the Court she would have been totally unaware of that inventory also. Therefore, in my opinion, it cannot be said that there is willful default committed by the

respondent in not filing inventory so as to make the probate liable to be revoked, for that reason.

6. Taking overall view of the matter therefore, in my opinion, it appears that the sole purpose of filing this petition is to extract money from the respondent. Really speaking filing of such petition is abuse of the process of the Court. The petition is therefore, disposed of. The petitioner is directed to pay compensatory cost to the respondent.